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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MELISSA C.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G033964

(Super. Ct. Nos. DP005535 &
DP005536)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Richard E. Behn, Judge. Petition denied. Request for stay. Denied as moot.

Juvenile Defenders and Donna P. Chirco for Petitioner.

No appearance for Respondent.

Benjamin P. de Mayo, County Counsel, and Beth L. Lewis, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Offices of Harold LaFlamme and Linda M. O'Neil for Real Parties in Interest Jordan C. and Nathaniel P.

* * *

INTRODUCTION

Jordan C. and Nathaniel P. were removed from the custody of their mother, Melissa C. (Mother), in October 2001. At that time, Jordan was three years old, and Nathaniel was six months old. The juvenile court sustained allegations of Mother's alcohol abuse, which negatively impacted her ability to protect and care for the children. Family reunification services were provided, and the children were returned to Mother's custody in April 2003, subject to continued supervision.

The children were again taken into custody in July 2003. The court sustained allegations that Mother was the victim of domestic violence and Jordan had been physically abused. Reunification services were again provided, and the children were again returned to Mother's care in January 2004.

In April 2004, the children were removed from Mother's custody for a third time because alcohol was found in the home, and it appeared Mother's abuser was permitted in the home, where he hit Mother and Jordan. Following a hearing, the juvenile court terminated reunification services and set the matter for a permanency hearing under Welfare and Institutions Code section 366.26. (All further statutory references are to the Welfare and Institutions Code.)

Mother filed a petition for writ of mandate pursuant to California Rules of Court, rule 39.1B, challenging the juvenile court's findings that (1) the children would be at a substantial risk of harm in Mother's custody and (2) Mother failed to participate in her case plan and make substantive progress in her case. We deny the petition because

the juvenile court's findings were supported by substantial evidence. The main grounds for removal of the children in October 2001 and July 2003 – Mother's alcohol abuse and the physical abuse of Mother and Jordan by Mother's boyfriend – remained unresolved despite two and one-half years of family reunification and maintenance services, creating a serious risk of detriment to the children's physical and emotional well-being. Mother also failed to complete three of the four aspects of her case plan in which the juvenile court had specifically required she show substantial progress.

FACTS

Jordan and Nathaniel were taken into protective custody on October 1, 2001, due to allegations of general neglect and caretaker absence. Mother pleaded nolo contendere to the allegations of an amended petition filed under section 300, subdivision (b). The amended petition alleged, and the trial court found true by a preponderance of the evidence: (1) Mother had a history of alcohol abuse and substance abuse, which interfered with her ability to supervise, parent, and protect the children; (2) on September 28, 2001, Mother became intoxicated, drove a car under the influence of alcohol, slapped her mother in the face, and attempted to leave her mother's home with the children in the car, one improperly restrained and the other unrestrained; (3) Mother suffered from depression and anxiety disorders, but failed to take medication or continue psychiatric treatment; (4) Mother was arrested and pleaded guilty to charges of child endangerment based on her conduct of September 28; (5) Mother had been the victim of domestic violence twice, one time in the presence of Jordan; (6) Jordan was suffering from severe tooth decay; and (7) neither Jordan's father nor Nathaniel's father was able or willing to supervise, parent, and protect the children. As a result of Mother's guilty plea on the child endangerment charges, she was placed on five years' probation, and sentenced to parenting classes, alcohol abuse treatment, and psychiatric treatment.

On November 5, 2001, the juvenile court declared Jordan and Nathaniel to be dependent children, and found it would be detrimental to the children to be placed in Mother's custody. Mother received 18 months of family reunification services from October 1, 2001 through April 17, 2003. Jordan and Nathaniel remained in foster care until April 17, 2003, when, during the 18-month review hearing, the parties stipulated, and the juvenile court ordered, that the children be returned to Mother, subject to continued supervision and the provision of family maintenance services.

On July 24, 2003, Jordan and Nathaniel were again taken into protective custody based on allegations that Jordan had been physically abused by Mother. In addition to realleging the facts sustained from the October 2001 petition, the Orange County Social Services Agency (SSA) alleged in a supplemental petition for more restrictive placement (§ 387) that: (1) Mother had been the victim of domestic violence at the hand of her boyfriend, Dominick T.; (2) Mother allowed Dominick to visit her home while the children were present, despite her awareness of Dominick's history of domestic violence; and (3) Jordan received a bruise to his cheek on July 19, 2003. Jordan told the social worker Mother hit him in the face with "the metal part" of a belt.

On November 4, 2003, in the middle of the trial on the supplemental petition, the parties reached a stipulation. Mother pleaded nolo contendere to the amended allegations of the supplemental petition, and the juvenile court found those allegations true by a preponderance of the evidence. The court determined Mother was not limited to only six months of reunification services, but "may have more reunification beyond the 6 months if her participation and/or progress warrant." The court also ordered, "For purposes of Mother's [family reunification] case plan, Mother shall participate and show progress in the following: [¶] Mother shall enroll in and complete a personal empowerment program [PEP] or a similar program as directed and approved by SSA. [¶] Mother is to enroll in and participate in counseling to address the issues that brought the children before the court (SSA to make efforts to refer Mother to a licensed

therapist). [¶] SSA to refer Jordan to counseling and shall arrange conjoint therapy with Mother as soon as it is appropriate. [¶] Mother must complete her program through KC Services [a child abuser's treatment program], as ordered by probation."

Also, as part of the stipulated court order, Jordan and Nathaniel were removed from their foster placement and returned to the Orangewood Children's Home. Jordan and Nathaniel remained at Orangewood for almost three months because there were no suitable placements for them together.

On January 30, 2004, Jordan and Nathaniel were placed with Mother for a 60-day trial visit. At that time, the social worker reported Mother claimed she had completed a 24-week parenting class; was nearing completion of her 52-week child abuser's treatment program; continued to test clean on her random drug tests; was continuing therapy sessions; and had completed about half of her PEP classes. The social worker expressed "some slight reservations about returning the children back to the mother's care prior to her hav[ing] completely finish[ed] her PEP class, however, she does appear motivated to finish and has seemingly learned from her entire experience at Social Services. The undersigned is hopeful that there will be no further incidents of concern with the children. The undersigned is hopeful that with the continuation of individual therapy for the mother and the children; and the intensive Family Preservation Services in place, that the children will . . . have a place to express any concerns they may have with the transition back into the mother's home. It is also hopeful that the mother will also have additional support to assist her with the likely stress that often occurs with returning children. Further, the mother will also continue on with her child abuse classes, attending [Alcoholics Anonymous] or [Narcotics Anonymous] as instructed by her Probation Officer and will continue on with the random drug testing with her Probation Officer. [¶] Therefore, the undersigned respectfully recommends that the Court maintain the children in the home with the mother under a trail [*sic*] visit, and maintain the Six-Month Status Review for March 24, 2004."

After the children were returned, however, it became clear Mother had been less than candid about her progress toward completing her case plan. SSA noted in later reports that Mother had been terminated from individual counseling because she missed too many appointments without rescheduling; Mother had failed to complete her remaining PEP classes; Mother had removed Jordan from kindergarten due to his behavioral problems “without another plan already in place”; and Jordan had stopped seeing his individual therapist. Although SSA provided Mother with another referral for individual counseling, she missed two initial intake appointments with the new counselor.

On February 24 and 29, 2004, the family preservation worker from Girls and Boys Town observed an empty beer bottle and beer bottle caps in Mother’s apartment. The family preservation worker also advised SSA that the children had indicated Dominick was spending the night with Mother. Mother told the family preservation worker she continued to see Dominick and showed pictures of herself with Dominick to the social worker. Mother also had a sticker on her computer reading, ““I love Dominic[k].””

On March 11, 2004, the social worker and the family preservation worker visited Mother and the children at their home. The social worker observed a broken window; Mother claimed Jordan had hit a ball through the window. Jordan, however, said Mother had kicked the window the previous night, and refused to respond to further questions.

On March 16, the family preservation worker reported that Mother had a large bump on her neck and dried blood in her ear. Mother said the bump was a large pimple and the blood came from hitting her ear on the nightstand.

Based on the conflicting stories about the broken window and concern about Mother’s injuries, SSA filed a child abuse report on March 18, 2004, alleging general neglect of the children.

A team decisionmaking (TDM) meeting was held on March 22, 2004, to resolve the problems and enable the children to remain with Mother. At the TDM meeting, it was decided that Mother would (1) obtain a letter from Jordan's doctor, explaining Jordan's behavioral problems at school to justify Mother's need to stay at home with him, and (2) follow through with CalWORKS regarding child care; Mother failed to do either as of April 12. It was also agreed at the TDM meeting that Mother would continue to participate in her case plan, including therapy for herself and the children, and completion of her PEP class.

In an addendum report dated March 24, 2004, SSA expressed concerns that (1) Mother was leaving the children with unauthorized caretakers, (2) alcohol was being consumed in the house, (3) Mother was hiding things from SSA, and (4) Dominick was spending the night at the house, despite Mother and Dominick's history of domestic violence. Nevertheless, SSA expressed the hope Mother could focus on the safety and well-being of her children, and recommended continuation of family reunification services.

A social worker met with Mother and the children at their home on March 25, 2004. Mother again explained Jordan had broken the window, and the injury to her ear was not the result of domestic violence. An empty beer can was found in Mother's bedroom; Mother explained that the 19-year-old neighbor spent the night and drank the beer the previous night. Mother refused to allow the children to be interviewed alone by SSA.

On April 8, 2004, a social worker made an unannounced visit to Mother's home. At that time, Mother denied having any contact with Dominick. Mother accused the social worker of making up the story about the empty beer can found on March 25. Mother claimed she could not attend counseling and PEP classes because of a lack of child care; SSA confirmed child care would be provided. Mother also claimed she had requested a letter from Jordan's school psychologist to CalWORKS; the school

psychologist told the social worker she was not sure what letter Mother was talking about. Jordan told the social worker, “Dominic[k] comes over, almost every night to see his mom. He stated that he does not like Dominic[k] . . . because ‘he hits me.’” Jordan also told the social worker he had seen Dominick hit Mother. Nathaniel told the social workers that Dominick comes over at night.

When social workers found a half empty bottle of rum during a walk-through of the house on April 8, Mother said it was not hers, claiming it had been left by Dominick when he lived there, and alternately it belonged to the underage neighbor. One of the social workers then interviewed the neighbor, who denied ever drinking in Mother’s apartment or hiding alcohol there. The neighbor later confirmed she had seen Mother drink alcohol in the home “recently.”

SSA placed Jordan and Nathaniel back into protective custody on April 8, 2004, and they were returned to Orangewood Children’s Home. The social workers observed “fingerprint sized red marks . . . on the back of Nathaniel’s waist when helping him put on his pajamas.” Jordan told the social workers Dominick had spanked Nathaniel. While at Orangewood, Jordan told his teacher he had seen Mother drink alcohol.

On April 12, 2004, Mother’s probation officer found two bottles of rum in a lower kitchen cupboard. Mother was terminated from the child abuser’s treatment program, and then arrested for violating her probation on April 27, 2004.

In an addendum report dated April 28, 2004, the social worker summarized Mother’s status as follows: “The following are the undersigned’s concerns: The original petition stated that the mother has severe alcohol related problems. To date, those issues have not been resolved. The undersigned continues to have concerns regarding the mother’s alcohol use. Alcohol and empty alcohol containers have been found in the mother’s home on several occasions. There have been reports that the mother is drinking, or they see her drink. This is of great concern to the undersigned that she may be

violating her [probation] and putting the children at risk. [¶] The mother was required to complete her services as listed above, including PEP classes, individual therapy, and child abuse classes. The undersigned has serious concerns that the mother has not finished her PEP classes, not attended therapy regularly, and has recently been terminated from KC Services, her child abuser[']s treatment program. The undersigned is concerned that the help that the mother needs to overcome her problems[] is not being sought, thus these are the same issues that brought the children into protective custody almost three years ago. [¶] Given the mother's domestic violence history, the undersigned is concerned the mother is allowing visitors in the home that social services does not know about and who may be a danger to the children. The children report that Dominic[k] is at the home frequently, and Jordan continues to report that he hits their mother and them. The children's story has remained consistent in reporting that Dominic[k] is in the home. [¶] It [is] also a concern to the undersigned that the mother has told the family preservation worker, Elizabeth Arias, and social services different versions of what is going on in her life. In addition, it appears she has lied to her children in front of the family preservation worker. [¶] . . . [¶] The undersigned believes that the mother's abilities to deal with her unresolved alcohol use are putting her children at risk, limiting her ability to parent and protect her children, as evidenced by her lack of follow through with services for herself and her children, and her inconsistent reporting to her service providers." SSA recommended that reunification services be terminated and the matter be set for a permanency hearing (§ 366.26).

The six-month review hearing was conducted between April 29 and May 10, 2004. On May 13 the juvenile court announced its findings. After explaining the terms of the stipulation reached on November 4, 2003, and then detailing the chronology of Mother's failure to complete the agreed-upon services since that date, the court stated: "You had a judge in your corner when we were here in November. This judge thought that the children had gotten a raw deal with the second placement. And I was willing to

go to bat for you. And I was happy when you got reunification services. And I was happy when you said you would do these things so you could get these children back because I really wanted you to get these children back. But just to quit once the children are returned seems, to me, that there has got to be some other problem. Could that other problem be drinking? That's the inference. Could that other problem be Dominick? That's the inference. And . . . when you don't go to the programs, when you don't complete the case plan, the law says that the children are still at risk. [¶] These children are young. You had 27 months to get your act together and you haven't. And at this point the court's going to terminate services."

The juvenile court found by clear and convincing evidence: (1) continued supervision was necessary; (2) return of the children to Mother would create a substantial risk of detriment to their physical or emotional well-being; (3) continued placement was necessary; (4) there had not been substantial progress made toward alleviating or mitigating the causes necessitating placement; (5) there had not been substantial compliance with the service plan; (6) reasonable services had been provided to Mother; (7) one of the children – Nathaniel – was under the age of three and the other – Jordan – was the sibling of the child who was under three years of age at the initial date of removal; and (8) Mother failed to participate regularly in the court-ordered case plan. The court terminated reunification services and set a hearing pursuant to section 366.26.

DISCUSSION

I.

STANDARD OF REVIEW

"If the child was under the age of three years on the date of the initial removal, or is a member of a sibling group described in paragraph (3) of subdivision (a) of Section 361.5, and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment

plan, the court may schedule a hearing pursuant to Section 366.26 within 120 days. If, however, the court finds there is a substantial probability that the child, who was under the age of three years on the date of initial removal or is a member of a sibling group described in paragraph (3) of subdivision (a) of Section 361.5, may be returned to his or her parent or legal guardian within six months or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing.”

(§ 366.21, subd. (e).) Nathaniel was under three years of age when the children were initially detained, and Jordan is his sibling, making this portion of section 366.21, subdivision (e) applicable.

The juvenile court’s findings under section 366.21, subdivision (e) are reviewed under the substantial evidence test (*Dawnel D. v. Superior Court* (1999) 74 Cal.App.4th 393, 398), which “requires us to determine whether there is reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged” (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401). “The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to all appeals. If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court’s order, and affirm the order even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence.” (*In re Megan S.* (2002) 104 Cal.App.4th 247, 250-251.)

II.

*SUBSTANTIAL EVIDENCE SUPPORTED THE JUVENILE COURT'S
FINDING THE CHILDREN WOULD BE AT SUBSTANTIAL RISK OF
DETRIMENT IF RETURNED TO MOTHER'S CUSTODY AND CARE.*

Jordan and Nathaniel were initially taken into protective custody because Mother's alcohol abuse posed a serious threat to their physical and emotional well-being. Almost two and one-half years later, an empty beer bottle, beer can, beer bottle caps, and bottles of rum were found in the home. Mother provided a series of explanations – the alcohol belonged to an underage neighbor, the alcohol belonged to her abusive boyfriend who had moved out a year earlier, the social worker had made up the whole thing. The neighbor told the social worker the alcohol was not hers, and she had seen Mother drinking. Jordan told his teacher at Orangewood Children's Home he had seen Mother drinking alcohol.

Another ground for initially taking the children into custody was the fact Mother had twice been the victim of domestic violence. The supplemental petition also alleged Dominick had abused Mother, she allowed Dominick to visit her home while the children were present, and Jordan had suffered an unexplained bruise. Jordan told the social worker Mother had hit him in the face with the metal part of a belt. By the spring of 2004, both Jordan and Nathaniel reported consistently that Dominick was spending the night, Jordan reported Dominick hit Mother and the children, Mother had dubious explanations for the injuries on her neck and ear, and Nathaniel had unexplained marks on his waist. Although Mother testified the children did not see or talk to Dominick, she believed her continued contact with Dominick would be good for her and the children. Mother's refusal to avoid contact with a violent individual who had abused and could continue to abuse her or the children presented a substantial risk of physical and emotional detriment to the children.

Thus, the two most serious grounds for removal of the children from Mother's custody remained unresolved after 30 months of family reunification and family maintenance services. There was more than substantial evidence supporting the juvenile court's finding that Jordan and Nathaniel would be at a substantial risk of detriment if they were returned to Mother's custody and care.

III.

*SUBSTANTIAL EVIDENCE SUPPORTED THE JUVENILE COURT'S
FINDING MOTHER FAILED TO PARTICIPATE REGULARLY AND
MAKE SUBSTANTIVE PROGRESS IN HER CASE PLAN.*

After receiving family reunification and maintenance services for 30 months, Mother failed to complete her service plan objectives. Specifically, Mother failed to complete three of the four requirements included in the November 4, 2003 court order.

Mother stopped participating in individual counseling. After missing three appointments with her counselor without rescheduling, Mother's counseling referral was terminated. SSA then referred Mother to a new counselor. Mother missed two initial intake appointments with the new counselor, and had not resumed counseling as of the six-month review hearing. Mother claimed she could not attend the initial intake sessions because she did not have child care. The new counseling provider, however, confirmed it would provide child care, and that Mother had been so advised.

Mother was also required to complete the PEP. The program consists of 10 classes, which are offered once a week in a cycle. Mother had not completed the 10 classes when the children were returned to her custody in January 2004, and still had not completed three classes as of the six-month review hearing in May 2004. Mother again excused her failure to complete the PEP in various ways – one class was cancelled due to water damage in the building, the rotation of classes she needed was off track, she did not have transportation to the class, and she did not have child care. A social worker testified

the classes Mother needed had been offered five times between January and April 2004, and Mother had declined a bus pass to resolve her transportation problem. Mother contends she “substantially complied with the PEP component of her case plan.” We disagree. A 30 percent failure rate is not substantial compliance, particularly when the total number of classes to be completed is 10.¹

Mother was also required to complete the child abuser’s treatment program as part of her case plan, as well as part of her criminal probation. Mother was terminated from this program for repeatedly missing classes. Mother again provided excuses of lack of child care and car problems. While Mother argues in her petition that she substantially complied with this portion of her case plan, it is notable she was arrested for violating her parole due to her failure to complete the child abuser’s treatment program. Moreover, while Mother “only had four of fifty two classes left to complete,” it must be remembered that she was provided family reunification and family maintenance services for 30 months yet failed to complete the treatment program, and that she stopped even attempting to complete the program after the children were returned to her care in January 2004.

In considering Mother’s overall progress since the inception of the dependency proceeding, Mother failed to make much, if any, progress in her case plan. The two primary problems leading to dependency – alcohol abuse and domestic violence – were not resolved after a total of 30 months of family reunification and maintenance services, and Mother could not even admit they were problems and she must modify her behavior to deal with them. We conclude there was substantial evidence

¹ At one point, a social worker testified Mother had only two classes left to complete in the PEP. The documentary evidence and the weight of the testimony indicate this one piece of testimony was in error. Even if it were correct, Mother has still failed to complete 20 percent of the PEP classes, and has not substantially completed her case plan in this regard.

supporting the juvenile court's finding that Mother had failed to participate regularly and make substantive progress in her case plan.

IV.

MOTHER'S REQUEST FOR A STAY IS MOOT.

Finally, Mother requested that, if this matter were not decided before September 9, 2004, we stay commencement of the section 366.26 hearing. Because we have reached our conclusions prior to the commencement date of the section 366.26 hearing, we deny Mother's request as moot.

DISPOSITION

The writ petition is denied.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.